IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64906-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
BRENT CURTIS MOORE,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: June 7, 2010
	)	
	)	

Cox, J. — A seizure under article I, section 7 of the state constitution occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority."[1] Here, an objective view of the actions of the law enforcement officers who approached Brent Moore before he discarded what turned out to be a bag of methamphetamine shows that Moore was unlawfully seized. The trial court erred by denying Moore's motion to suppress that evidence. We reverse and remand.

Law enforcement officers, Deputies Jason Granneman and Eric Dunham,

[1] State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)).

were on patrol together around midnight when they saw Moore walking down the side of a street in Clark County. They did not observe any criminal conduct or violations by Moore. They both testified at the suppression hearing that they intended to make a social contact with Moore.

The officers pulled their patrol car over near Moore. They did not activate the siren or overhead lights of their patrol car. However, they did train a spotlight on him.

When Deputy Granneman stepped out of the patrol car with his hand on his sidearm he was approximately 10 to 15 feet from Moore. The deputy observed Moore quickly turn his body away from the officers and place his right hand into his right hip pocket.

Deputy Granneman told Moore to remove his hand from his pocket. As Moore removed his hand from his pocket, Deputy Granneman saw a white bag fly out of Moore's hand. The deputy detained Moore at that point.

Deputy Granneman did not place Moore in handcuffs. However, he did frisk Moore for weapons and requested identification. Based on the identification that Moore provided, the deputies learned that there was an outstanding warrant for his arrest. Deputy Granneman then arrested Moore.

Deputy Granneman recovered the bag that came out of Moore's hand when he removed it from his pocket. It was approximately two feet from where Moore was standing when the officers first spoke to him. The Washington State Patrol Crime Lab tested the substance in the bag and determined that it was

methamphetamine.

The State charged Moore with one count of possession of a controlled substance—methamphetamine. Prior to trial, Moore moved to suppress the methamphetamine evidence, arguing that the police had obtained it following an illegal seizure. The trial court denied the motion, but did not enter findings and conclusions until after service and filing of Moore's opening brief in this appeal.

At trial, a jury convicted him as charged. The court sentenced him within the standard range to 19 months of confinement. The court also imposed certain conditions of community custody.

Moore appeals.

SEIZURE

Moore argues that the trial court erred when it denied his motion to suppress the methamphetamine. He claims he was illegally seized prior to the drugs coming out of his pocket. We agree.

In Washington, a warrantless search or seizure is per se unconstitutional under article I, section 7 of the state constitution unless it falls within one of the exceptions to the warrant requirement.[2] A seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority."[3] Whether police action is a

[2] Rankin, 151 Wn.2d at 695 (citing State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)).

[3] Id. (quoting O'Neill, 148 Wn.2d at 574).

seizure is determined by looking objectively at all the actions of the law enforcement officer.[4]

Where there is no issue of physical force, the question is whether a reasonable person in the defendant's position would have believed he or she was free to go or otherwise terminate the encounter, given the actions of the officer.[5] "Whether there was any show of authority on the officer's part, and the extent of any such showing, are crucial factual questions in assessing whether a seizure occurred."[6]

In addressing what circumstances may constitute a seizure, our supreme court has noted the following.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.[7]

In addition, the supreme court has confirmed that,

> Where an officer *commands* a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and *requests* to talk to him or her, engages in conversation, or *requests*

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[4] Id. (citing State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

[5] O'Neill, 148 Wn.2d at 577 (citing Young, 135 Wn.2d at 510-11).

[6] Id.

[7] Young, 135 Wn.2d at 512 (quoting U.S. v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

> identification, so long as the person involved need not answer and may walk away.[8]

Challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal.[9] The trial court's factual findings are entitled to great deference, but whether those facts ultimately constitute a seizure is a question of law that this court reviews de novo.[10] Moore has the burden of proving that a seizure occurred in violation of article I, section 7.[11]

Here, the State does not contend that Moore's encounter with the deputies was justified by any exception to the warrant requirement. And the written findings of the trial court confirm that the deputies did not observe Moore engaging in any criminal activity or other violations when they decided to approach him. Thus, the question is whether the deputies seized Moore prior to the point when they detained him after seeing the bag come out of his pocket.

To determine whether the deputies seized Moore, the relevant question is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[12] Here, Moore was

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[8] O'Neill, 148 Wn.2d at 577-78 (quoting State v. Cormier, 100 Wn. App. 457, 460-61, 997 P.2d 950 (2000)).

[9] O'Neill, 148 Wn.2d at 571.

[10] State v. Thorn, 129 Wn.2d 374, 351, 917 P.2d 108 (1996), overruled on other grounds by O'Neill, 148 Wn.2d at 564.

[11] O'Neill, 148 Wn.2d at 574.

[12] State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997) (quoting Mendenhall, 446 U.S. at 554).

walking down the street alone around midnight. Two deputies on patrol pulled up within 10 to 15 feet of him and trained a spotlight on him. One deputy stepped out of the patrol car with his hand on his sidearm. This deputy "told [Moore] to remove his hand from his pocket." As Moore did so, this deputy saw "a white baggie fly out of [Moore's hands]."

As the cases explain, there is a significant difference between a command by an officer and a request for purposes of determining whether a seizure occurs.[13] The written findings state that the deputy "told" Moore to remove his hands from his pocket. But this does not tell us whether this was a command or a request. To resolve this important question, we examine the record further.[14]

Deputy Granneman testified as follows at the suppression hearing:

(Direct examination)

Q. Okay. ***Do you remember what the first thing you said to the defendant was?***

A. ***Take his hands out of his pockets.***[15]

(Cross Examination)

Q. Now, he's walk—now walking eastbound after you've gotten out of the car. ***What do you say to him first?***

A. Well, after he put his hands in his pockets, ***I told him to take—take his hands out.***

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[13] O'Neill, 148 Wn.2d at 577-78.

[14] See State v. Teuber, 109 Wn. App. 640, 646, 36 P.3d 1089 (2001) (holding inadequate written findings may be supplemented by the trial court's oral decision or statements in the record) (citing In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986)).

[15] Report of Proceedings (April 15, 2009) at 19-20 (emphasis added).

> Q. Did you say anything to him before he put his hands in his pockets?
>
> A. Not that I recall.[16]
>
> (Redirect Examination)
>
> Q. Okay. ***And to the best of your recollection, the—is the first thing you said to him was, "Take your hand out of your pocket?"***
>
> A. ***Correct***.[17]

In making its oral ruling at the suppression hearing, the court stated:

> The question here is what took place after that contact was made. ***The testimony from the defendant and from the officers is the first immediate command is, "Take the hands out of the—out of your pocket."*** And as the Nettles case points out, that changes it to an officer safety aspect, comply with that command, walk on your way, say, I don't want to talk to you guys anymore, case is over.[18]

The deputy's command for Moore to remove his hands from his pocket, together with the fact the deputy had his hand on his sidearm, make clear that Moore could not have reasonably believed that he was either free to leave or to otherwise terminate the encounter with the deputies. Although the training of the spotlight on Moore a short time before this command did not, by itself, constitute a seizure, that act was part of the totality of the circumstances in this case that contributes to our conclusion that the deputies seized Moore. He could not have reasonably believed he was free to go with the show of authority evidenced by

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[16] Id. at 30-31 (emphasis added).

[17] Id. at 32 (emphasis added).

[18] Id. at 43 (emphasis added).

the deputies' actions.

We note there is an apparent discrepancy between the above testimony of Deputy Granneman and unchallenged written finding 5 regarding whether he said anything to Moore before the command to remove his hands from his pocket. According to the testimony, the first thing the deputy said to Moore was to remove his hands from his pocket. Yet the finding states he first "asked the defendant to talk with him."

For purposes of our analysis, this apparent discrepancy is irrelevant. Our legal conclusion remains that the totality of the circumstances here indicates that the deputy's show of authority constituted a seizure. This is so regardless of whether the deputy asked to speak with Moore before commanding him to remove his hand from his pocket. This seizure was without the authority of law that our state constitution requires.

The State argues that no seizure occurred because the deputies intended only a "social contact" with Moore. The State relies heavily on State v. Nettles[19] to support this argument. But that case is distinguishable.

In Nettles, this court concluded that an officer's request that the defendant keep his hands out of his pockets did not independently rise to the level of a seizure.[20] The Nettles court noted that directing an individual to merely remove his hands from his pockets has been held elsewhere to fall short of a seizure.[21]

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[19] 70 Wn. App. 706, 855 P.2d 699 (1993).

[20] Id. at 712.

We do not quarrel with that observation.

Nevertheless, the manner in which this court applied these principles to the facts of that case is helpful to understanding why we reach a different conclusion here. There, the court noted that the police officers did not approach Nettles with either siren or patrol lights. In contrast, here, the deputies trained a spotlight on Moore just before pulling up to within 10-15 feet of him. In Nettles, the court noted that the officer did not draw her weapon when exiting the patrol car to approach Nettles. Here, the deputy approached Moore with his hand on his sidearm. There, the officer addressed Nettles in what the court stated was "a normal voice." As we have explained earlier in this opinion, the trial court here viewed the deputy's voice as a command.

The Nettles court also stated that, while not dispositive, nothing in the record indicated that Nettles perceived the encounter with police as other than permissive in nature. Here, of course, Moore testified that he did not feel free to leave, testimony the court was free to either accept or reject.

In short, the facts here are quite different from those in Nettles. This was a seizure.

The State also relies on State v. Young.[22] But that case is also distinguishable.

In Young, our supreme court reiterated that article 1, section 7 permits

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[21] Id. at 710 n6.

[22] 135 Wn.2d 498, 957 P.2d 681 (1998).

social contacts between police and citizens.[23] "[I]t is well-established that '[e]ffective law enforcement techniques not only require passive police observation, but also necessitate their interaction with citizens on the streets.'"[24] Specifically, the court determined that the police shining a spotlight on a person already in a public area, without additional indicia of authority, does not violate article 1, section 7.[25]

Here, the training of a spotlight, by itself, does not amount to a seizure. But, as we have explained, the additional factors demonstrating the deputies' show of authority make the spotlight important under the totality of circumstances analysis that governs this case.

The State is correct that the deputies intended to make a "social contact." But their subjective intent is irrelevant to the inquiry that we must make.[26] The focus is on the objective actions of the officers and whether these actions, given the totality of the circumstances, would lead a reasonable person to believe that he was not free to leave or otherwise end the encounter.

We conclude that Moore was seized prior to dropping the

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[23] Id. at 511.

[24] Id. (citing State v. Tucker, 136 N.J. 158, 642 A.2d 401 (1994) (quoting People v. Mamon, 435 Mich. 1, 457 N.W.2d 623 (1990))).

[25] Id. at 514.

[26] See State v. Knox, 86 Wn. App. 831, 839, 939 P.2d 710 (1997) (subjective intent of police is irrelevant to the question of whether a seizure occurred unless it is conveyed to the defendant), overruled on other grounds by O'Neill, 148 Wn.2d at 571.

methamphetamine on the ground. The trial court erred in concluding otherwise.

Moore next argues that there must be a causal nexus between the seizure and the abandonment of the contraband.[27] The State does not respond to this argument, and the trial court did not reach this issue because it ruled there was no seizure until after the deputies observed the contraband.

Accordingly, we remand for further proceedings because Moore was seized. The trial court shall resolve the question of causal nexus between the seizure and abandonment.

COMMUNITY CUSTODY CONDTION

Finally, Moore challenges his sentence, arguing that a condition of his community custody is unconstitutionally vague because it does not put him on notice of what conduct is prohibited. Because we reverse the judgment and sentence and remand with instructions, we conclude that it is unnecessary to reach the merits of this claim at this time.

We reverse the judgment and sentence and remand for further proceedings.

Cox, J.

[27] Brief of Appellant at 12.

WE CONCUR: